INSIDER TRADING, SELECTIVE DISCLOSURE, AND PROMPT DISCLOSURE: A COMPARATIVE ANALYSIS

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The United States securities law framework may be perceived as a model to be adapted to the culture and needs of other jurisdictions.[1] Included within this framework are issues focusing on insider trading and company affirmative disclosure practices. Examining U.S. law on these subjects, however, reveals a regime that at times fails to accord fair treatment to market participants and impedes commercial certainty.[2] Countries abroad thus may be ill served by embracing the U.S. model in these areas. Indeed, with respect to these areas, a survey of the securities laws of developed markets reveals that these countries have rejected the U.S. approach.[3] Rather, by adhering to an insider trading prescription premised on participant equal access to material nonpublic information,[4] a number of these countries reflect the U.S. law in the pre-*Chiarella*[5] era.[6]

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I dedicate this article to my father-in-law Walter Greenblatt, a graduate of the Wharton School of this superb university, whose sudden death in April 2000 is a grievous loss to his family and friends. Walter was my terrific father-in-law. I am pleased to dedicate this article to Walter in a University of Pennsylvania Journal—the University that Walter was so very proud of being an Alumnus.

1 *See generally* MARC STEINBERG, INTERNATIONAL SECURITIES LAW—A CONTEMPORARY AND COMPARATIVE ANALYSIS (1999).

2 *See infra* notes 58-77, 116-36 and accompanying text.

3 *See infra* notes 138-208 and accompanying text.

4 *See infra* notes 176-83 and accompanying text.

5 Chiarella v. United States, 445 U.S. 222 (1980).

6 *See infra* notes 21-27 and accompanying text.

Given the ambiguity and complexity of U.S. law in these areas, the Congress and the Securities and Exchange Commission (the "SEC") may be advised to assess the regulatory framework in certain other countries and determine their feasibility of application to the U.S. system. It may eventuate that key principles readily can be implemented from favored securities jurisdictions in order to enhance the clarity and efficiency of the U.S. framework.[7]

Regardless of its purported shortcomings, the U.S. securities regime maintains a critical component that other countries thus far have failed to achieve: an enforcement framework, based on government as well as private actions, that enhances compliance with the law and facilitates the levying of sanctions should violations occur.[8] Effective enforcement is the key attribute of the U.S. securities law framework that distinguishes it from the regulatory structure existing in other countries. Hence, although the contours of U.S. securities law in the insider trading and company affirmative disclosure areas may need refinement, effective enforcement elevates the U.S. framework to preeminence among securities markets. Briefly put, it is far more beneficial for achieving market integrity and investor confidence to effectively implement imperfect (yet palatable) securities laws than have admirable statutes that are rarely or episodically enforced.[9]

This article thus focuses on regulation of insider trading and company affirmative disclosure in developed securities markets. First, the U.S. regime is discussed. Thereafter, the securities laws of selected developed markets are addressed in order to provide contrasts to the U.S. approach. Last, the article focuses on a number of significant issues that merit exploration.

1. U.S. REGULATION

1.1. Insider Trading

1.1.1. Preeminence of Federal Law

The following discussion examines key aspects of U.S. law in the insider trading and issuer affirmative disclosure areas. With

[7] *See, e.g., infra* notes 199-208 and accompanying text.

[8] *See infra* notes 224-33 and accompanying text.

[9] *See infra* note 235 and accompanying text.

respect to insider trading regulation, federal law is the primary source of regulation.[10] Although some states, such as New York, allow derivative suits against inside traders based on unjust enrichment[11] and perceived injury to the corporate enterprise,[12] state law often is unavailable in this context.[13] For example, the nonrecognition by state courts of an insider's disclosure obligation when transactions occur on impersonal securities markets[14] as well as such courts' refusal to find the requisite injury to the corporation[15] signify that allegedly aggrieved traders must turn to federal law to seek redress.[16]

Section 16 of the Securities Exchange Act of 1934[17] governs short-swing trading by directors, officers, and ten percent equity holders of publicly-held entities. Pursuant to Section 16(b), such persons are subject to strict liability, requiring disgorgement of all profit, if they buy and sell (or sell and buy) an equity security of a subject entity within a six-month period.[18] Section 16 raises several

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[10] *See generally* WILLIAM WANG & MARC STEINBERG, INSIDER TRADING (1996 & Supp. 2001)

[11] *See, e.g.*, Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969).

[12] *Id.*

[13] *See, e.g.*, Freeman v. Decio, 584 F.2d 186, 187-96 (7th Cir. 1978) (applying Indiana law); Schein v. Chasen, 313 So.2d 739, 746 (Fla. 1975); WANG & STEINBERG, *supra* note 10, § 16.1, at 1106 ("State law is rarely applied to stock market insider trading.").

[14] *See, e.g.*, Van Shaack Holdings, Ltd. v. Van Shaack, 867 P.2d 892 (Colo. 1994); Hotchkiss v. Fischer, 16 P.2d 531 (Kan. 1932), Bailey v. Vaughan, 359 N.E.2d 599 (W. Va. 1987).

[15] Sources cited note 14 *supra*. *See* Douglas M. Branson, *Choosing the Appropriate Default Rule – Insider Trading Under State Law*, 45 ALA. L. REV. 753, 767 (1994) (describing the Florida Supreme Court's finding that a corporate president's act of tipping, which enabled mutual fund clients to avoid a price drop of three dollars per share, had not harmed the corporation); Thomas Lee Hazen, *Corporate Insider Trading: Reawakening the Common Law*, 39 WASH. & LEE L. REV. 845, 856-57 (1982) (discussing the Florida Supreme Court's rejection of a derivative suit due to the absence of any injury to the coproration).

[16] STEINBERG, *supra* note 1, at 106-07. Note that certain state securities laws may allow government and/or private actions based on alleged insider trading violations. *See* WANG & STEINBERG, *supra* note 10 § 16.4. *See generally* Marc Steinberg & Ralph Ferrara, *Securities Practice: Federal and State Enforcement* §§ 12:01-12:29 (1999 & Supp. 2000).

[17] 15 U.S.C. § 78p (1994 & Supp. V 1999).

[18] *See, e.g.*, Whittaker v. Whittaker Corp., 639 F.2d 516 (9th Cir. 1981); Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). *See generally* PETER J. ROMEO & ALAN L. DYE, SECTION 16 REPORTING GUIDE (2000).

complex issues,[19] including whether the statute has outlived its usefulness and should be repealed.[20] This article declines to enter the Section 16 fray, focusing instead on the securities acts' antifraud provisions which constitute the essence of insider trading regulation in the United States.

1.1.2. Rejection of Access and Parity Theories

Under U.S. law, no statute codifies the contours of the insider trading prohibition. Rather, the federal courts and the SEC are the principal actors. Prior to U.S. Supreme Court decisions in the 1980s, lower courts adhered to the parity of information[21] and equal access approaches[22] when interpreting the "disclose or abstain" mandate of Exchange Act section 10(b)[23] (and SEC Rule 10b-5[24]) in the insider trading setting. Under the parity of information theory, as enunciated by the U.S. Court of Appeals for the Second Circuit, "anyone in possession of material inside information must either disclose it to the investing public, or . . . must abstain from

[19] For example, these issues include the concepts of beneficial ownership and attribution, identifying which persons may be officers, and applying the objective versus the pragmatic approach. *See, e.g.*, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) (regarding beneficial ownership); CBI Indus., Inc. v. Horton, 682 F.2d 643 (7th Cir. 1982) (regarding attribution); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston, 566 F.2d 1119 (9th Cir. 1978) (regarding corporate officers); Sec. Exchange Act Release No. 28,869, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709 at 81,248 (1991) (regarding compliance with Section 16).

[20] *See* Marleen A. O'Connor, *Toward a More Efficient Deterrence of Insider Trading: The Repeal of Section 16(b)*, 58 FORDHAM L. REV. 309, 313 (1989) ("[T]his Article concludes that section 16(b) is an archaic, blunt weapon which no longer serves a useful purpose in the effort to deter insider trading."). *But See* Steve Thel, *The Genius of Section 16: Regulating the Management of Publicly Held Companies*, 42 HASTINGS L.J. 391 (1991) (suggesting that section 16 promotes the efficient operation of publicly held corporations by deterring corporate officers from manipulating corporate affairs for their own ends). *See generally* Marc I. Steinberg & Daryl L. Lansdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 NOTRE DAME L. REV. 33 (1992) (discussing the parameters of section 16(b)).

[21] *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc); *infra* note 25 and accompanying text.

[22] *See, e.g.*, United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980); *infra* note 26 and accompanying text.

[23] 15 U.S.C. § 78j(b) (1994 & Supp. V 1999).

[24] 17 C.F.R. § 240.10b-5 (2001). *See generally* Ralph C. Ferrara & Marc I. Steinberg, *A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism*, 129 U. PA. L. REV. 263 (1980) (discussing Section 10(b) as an experiment in American Federalism).

trading in or recommending the securities concerned while such information remains undisclosed."[25] The equal access theory, a more narrow approach, posits that "[a]nyone—corporate insider or not—who regularly receives material nonpublic information may not use this information to trade in securities without incurring an affirmative duty to disclose."[26] Insofar as tipper-tippee liability, lower courts held that a tippee stood in the shoes of the tipper. A tippee knowingly receiving material nonpublic information from a tipper, when such tipper could not trade on that information, likewise was subject to the disclose or abstain mandate.[27] As will be discussed in the article's next section, a number of countries by statute adhere to at least some of the foregoing principles.[28]

Today, the parity of information and equal access approaches for Section 10(b) purposes no longer retain validity.[29] Rather, as construed by the U.S. Supreme Court, the breadth of the insider trading proscription under Section 10(b) is premised on principles based on fiduciary duty and trust and confidence.[30] Other key concepts in this context include the materiality[31] of the particular information and whether that information is confidential (namely, whether it has been adequately disseminated and absorbed by the investment community).[32]

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[25] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc).

[26] United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980).

[27] *See, e.g.*, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974).

[28] *See infra* notes 177-93 and accompanying text.

[29] *See, e.g.*, Dirks v. SEC, 463 U.S. 646 (1983) (holding that the recipient of material nonpublic information about a corporation has no duty to abstain from use of the information where the tipper received no benefit from revealing the information nor pretended to give a gift of valuable information to the tippee); Chiarella v. United States, 445 U.S. 222, 223 (1980) (holding that a duty to disclose under section 10(b) "does not arise from the mere possession of nonpublic market information.").

[30] *See, e.g.*, Chiarella, 445 U.S. at 230 (opining that such liability "is premised upon a duty to disclose arising from a relationship of trust and confidence").

[31] *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 232, 240 n. 18 (1988); Ganino v. Citizens Utilities Company, 228 F.3d 154 (2d Cir. 2000); SEC v. Mayhew, 121 F.3d 44 (2d Cir. 1997).

[32] *See, e.g.*, United States v. Libera, 989 F.2d 596, 601 (2d Cir. 1993) (deciding on whether there was sufficient evidence that certain information was material and nonpublic); *In re* Faberge, Inc., 45 S.E.C. 244, 256 (1973); STEINBERG, *supra* note 1, at 109-10. From a general perspective:

Hence, as interpreted by the U.S. Supreme Court, trading on the basis of material nonpublic information by a director, officer, or other insider (e.g., a controlling shareholder) in the subject company's securities is prohibited under Section 10(b) because, by engaging in such trading, such person breaches a fiduciary duty owed to the company and to the parties on the opposite side of the transactions, namely, the company's shareholders.[33] Accordingly, a disclosure obligation arises in this context from a relationship of trust and confidence between the transacting participants.[34] Likewise, the subject company's consultants, including lawyers, accountants, and bankers, who become privy to material nonpublic information with the understanding that this information must remain confidential, are defined as quasi-insiders and thereby are deemed to have a relationship of trust and confidence with the company and its shareholders.[35] Such persons accordingly are subject to the disclose or abstain mandate, to wit, that they must adequately disclose the material information to the marketplace or abstain from trading (as well as tipping) until such dissemination is effected.[36] Nonetheless, insiders, who elect to make adequate disclosure prior to their trade(s) (or tip(s)), violate the corporation's need for confidentiality regarding such information and incur state law liability exposure.[37]

> [M]aterial information becomes public in either of two ways. The first view is that information that is disseminated and absorbed by the investment community is public. The second view is premised on the efficient market theory, and under this view, information is deemed public when the active investment community is aware of such information. Under the efficient market theory, information that is known by the investment community will be reflected in the price of an efficiently traded security.

MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 3.03 (2001).

[33] *See, e.g., Chiarella*, 445 U.S. at 230 ("Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.").

[34] *Id.*

[35] Dirks v. SEC, 463 U.S. 646, 655 n. 14 (1983).

[36] *Id.* ("The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.").

[37] *See* STEINBERG, *supra* note 1, at 110-11; WANG & STEINBERG, *supra* note 10, § 5.2.2.

In regard to "outsiders," namely, those individuals who do not have a fiduciary obligation to those who trade on the other side of the subject transactions, the misappropriation theory may be invoked.[38] Under this theory, a Section 10(b) violation occurs when the subject actor misappropriates material nonpublic information for securities trading objectives, resulting in breaching a relationship of trust and confidence to the source of the information, irrespective whether such source is or is not a party to the trade.[39] Accordingly, an employee who misappropriates material confidential information entrusted to her employer and who uses such information for securities trading purposes breaches a relationship of trust and confidence to her employer and perhaps to her employer's clients.[40]

Turning to unlawful "tipping" under Section 10(b), the critical inquiries are whether the tipper breached his fiduciary duty (or a relationship of trust and confidence) by communicating the subject information to his tippee(s) and whether the subject tippee(s) knew or should have known of the breach.[41] Without the finding of a breach, a tippee may trade and tip without violating Section 10(b).[42] Consistent with Supreme Court analysis, an insider is held to breach his fiduciary duty by tipping the subject information while having the motivation to receive a personal benefit. Such personal benefit normally is of a pecuniary nature, such as cash or elevation in status that will result in future financial benefits.[43] A gift also is deemed a sufficient personal benefit: the gift of tipping the material nonpublic information is likened to trading by the in-

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38 *See, e.g.*, United States v. O'Hagan, 521 U.S. 642 (1997).

39 *Id.* at 2207.

40 *Id.*; *see* United States v. Newman, 664 F.2d 12 (2d Cir. 1981); Steinberg, *supra* note 1, at 111. *See generally* WANG & STEINBERG, *supra* note 10, at § 5.4 (2001 Supp.); Bromberg & Lowenfels, *Misappropriation in the Supreme Court*, 31 REV. SEC. & COMM. REG. 37 (1998); Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post – O'Hagan Suggestion*, 59 OHIO ST. L.J. 1223 (1998); Steven A. Ramirez & Christopher M. Gilbert, *The Misappropriation Theory of Insider Trading Under United States v. O'Hagan: Why Its Bark Is Worse Than Its Bite*, 26 SEC. REG. L.J. 162 (1998); Elliott J. Weiss, *United States v. O'Hagan: Pragmatism Returns to the Law of Insider Trading*, 23 J. CORP. L. 395 (1998).

41 Dirks v. SEC, 463 U.S. 646 (1983).

42 *See id.* at 661-62 ("All disclosures of confidential corporate information are not inconsistent with the duty insiders owe shareholders.").

43 *Id.* at 662-64.

sider himself with the transfer to the tippee-recipient of the profits generated from the trades.[44]

1.1.3. Rule 14e-3 – Insider Trading in the Tender Offer Setting

In contrast to the Section 10(b) jurisprudence of insider trading is SEC Rule 14e-3 which applies only in the tender offer setting.[45] In this limited context, the proscriptions against trading and tipping on material confidential information are significantly broader. Under Rule 14e-3, a person who obtains material confidential information regarding a tender offer directly or indirectly from the offeror (bidder), target corporation, or an intermediary neither can trade nor tip prior to adequate public disclosure (and absorption) of such information.[46] In addition, a tippee of material confidential information relating to a tender offer who knows or should know that the subject information comes directly or indirectly from an offeror, target corporation or intermediary similarly cannot trade or tip prior to adequate public disclosure (and absorption) of this information.[47] Rule 14e-3 provides an exception to this expansive disclose or abstain rule for multi-service financial institutions which adopt and implement sufficient screening mechanisms that effectively prevent the flow of confidential information to those who effect or recommend trades in the subject company's securities.[48]

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44 *Id.* at 664 (opining that "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient"); Steinberg, *supra* note 1, at 111; *see* Bruce A. Hiler, *Dirks v. SEC – A Study in Cause and Effect,* 43 MD. L. REV. 292, 318 (1984) ("The *Dirks* Court itself begins this process when it creates a per se rule or an irrebuttable presumption of personal benefit when 'an insider makes a gift of confidential information to a trading relative *or friend.*'").

45 General Rules and Regulations, Securities Exchange Act of 1934 17 C.F.R. § 240.14e-3 (2001). Rule 14e-3 was adopted in Tender Offers, Exchange Act Release No. 17120, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,646 at 83,453 (Sept. 4, 1980).

46 *See* Rule 14e-3(a), (d), 17 C.F.R. § 240.14e-3(a), (d). The Supreme Court upheld Rule 14e-3's validity in *United States v. O'Hagan,* 521 U.S. 642 (1997).

47 Rule 14e-3(d), 17 C.F.R. § 240.14e-3(d).

48 Rule 14e-3(b), 17 C.F.R. § 240.14e-3(b), STEINBERG, *supra* note 1, at 112; *see* SEC Division of Market Regulation, "Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information," [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,520 (1990); Theodore A. Levine et al., *Multiservice Securities Firms: Coping With Conflicts in a Tender Offer Context,* 23 WAKE FOREST L. REV. 41 (1988); Marc Steinberg & John Fletcher, *Compliance Programs for Insider Trading,* 47 SMU L. Rev. 1783 (1994).

1.1.4. Critique of U.S. Insider Trading Law

United States law on insider trading is far from laudable. Today, as a result of Supreme Court decisions, concepts focusing on fiduciary duty, misappropriation, and financial benefit determine the propriety of transactions consummated or contemplated. The objective of ensuring that ordinary investors are on an equal footing with market professionals to access material nonpublic information is no longer viable under Section 10(b) insider trading jurisprudence.[49] Although Congress clearly intended the federal securities acts to extend greater investor protection than state law, the Supreme Court's foremost reliance on state law premised on concepts of fiduciary duty slights that congressional objective.[50]

Indeed, the SEC, acting ostensibly within its rulemaking authority, has sought to minimize restrictive Supreme Court law. One example is the SEC's promulgation of Rule 14e-3 which sets forth expansive parity of information and anti-tipping mandates in the tender offer context.[51] In the Section 10(b) setting, the Commission has advocated a broad construction of Supreme Court precedent,[52] even prescribing new rules that in effect "overturn" lower

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[49] *See supra* notes 21-44 and accompanying text.

[50] *See* Chiarella v. United States, 445 U.S. 222, 245-52 (1979) (Blackmun, J., dissenting). As Justice Blackmun opined:

> By its narrow construction of § 10(b) and Rule 10b-5, the Court places the federal securities laws in the rearguard of this movement, a position opposite to the expectations of Congress at the time the securities laws were enacted.... I cannot agree that the statute and Rule are so limited. The Court has observed that the securities laws were not intended to replicate the law of fiduciary relations. Rather, their purpose is to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate. As Congress itself has recognized, it is integral to this purpose "to assure that dealing in securities is fair and without undue preferences or advantages among investors."

Id. at 248 (citations omitted); *see also* Alison Anderson, *Fraud, Fiduciaries, and Insider Trading*, 10 HOFSTRA L. REV. 341 (1982); Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties Into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. Rev. 1189 (1995).

[51] *See supra* notes 45-48 and accompanying text.

[52] Two such examples are the SEC's assertion that applicable Supreme Court decisions allow for broad interpretations of trading "on the basis of" inside information and the requisite "benefit" for tipping purposes. *See, e.g.*, SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998) (rejecting SEC's assertion but adopting a presumption of use when one trades while knowingly possessing material nonpublic information); SEC v. Stevens, SEC Litigation Release No. 12,813 (Mar. 19, 1991) (de-

court authority.[53] In another recent regulatory action, the SEC adopted Regulation FD that seeks to terminate the practice by companies of selectively disclosing material nonpublic information to market professionals and favored shareholders.[54] While these selective disclosure practices constitute illegal insider tipping under the laws of many countries[55] and indeed were illegal in this country prior to the Supreme Court's decision in *Dirks*,[56] such conduct is impermissible under Section 10(b) today only if the tipper is motivated by a desire to personally benefit from the selective disclosure.[57]

Some concrete examples illustrate the erratic treatment of insider trading law in the United States. One striking illustration is the different treatment accorded to tender offers due to SEC Rule 14e-3.[58] Literally, an individual can legally retain profits by trading on material inside information or be held liable simply by the fortuity of whether a tender offer is implicated. For example, Barry Switzer, the former football coach of the Dallas Cowboys and the University of Oklahoma, inadvertently received material nonpublic information from a key corporate executive relating to a forth-

scribing settlement where SEC alleged that insider received personal benefit under *Dirks* test by "tipping" inside information to securities analysts).

[53] *See* General Rules and Regulations, Securities Exchange Act of 1934, SEC Rules 10b5-1, 17 C.F.R. § 240.10b5-1, adopted in, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 (2000). By adopting in Rule 10b5-1 a broad "awareness" test rather than a "use" standard for determining when trading is "on the basis" of material nonpublic information, the SEC rejected the standards set forth in at least two appellate court decisions. *See* United States v. Smith, 155 F.3d 1051 (9th Cir. 1998); SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998); Horowitz & Bitar, *Insider Trading: New SEC Rules and an Important New Case*, 28 Sec. Reg. L.J. 364 (2000); Donna M. Nagy, *The "Possession vs. Use" Debate in the Context of Securities Trading by Traditional Insiders: Why Silence Can Never Be Golden*, 67 U. CIN. L. REV. 1129 (1999). Moreover, by its promulgation of Rule 10b5-2, the SEC has "overturned" the Second Circuit's decision in *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc) (discussed *infra* notes 66-77 and accompanying text).

[54] *See* Securities Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 (2000) (discussion *infra* notes 88-115 and accompanying text).

[55] *See infra* notes 176-86, 195-96 and accompanying text.

[56] *See, e.g.*, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980); *supra* note 27 and accompanying text.

[57] *See supra* notes 41-44 and accompanying text.

[58] For a description of Rule 14e-3, see *supra* notes 45-48 and accompanying text.

coming merger transaction.[59] Knowing the information to be reliable because of his relationship with the insider, Switzer (along with his cronies) traded on the basis of this information and made a handsome profit.[60] In that the insider was unaware of Switzer being privy to the communications at issue, the court held there was no unlawful tipping.[61] Because the tippee's liability under Section 10(b) is derivative in nature,[62] the finding that the insider-tipper did not breach his fiduciary duty signified that Switzer as the tippee traded lawfully, and, hence, was entitled to keep his profits.[63]

The result in *Switzer* would have been entirely different if the subject transaction had been structured as a tender offer rather than a merger. In that event, Rule 14e-3 as well as Section 10(b) would have applied. Although Switzer would have avoided liability under Section 10(b), he would have violated Rule 14e-3 by trading on material nonpublic information that he knew derived from a reliable inside source.[64] Hence, pursuant to Rule 14e-3, irrespective of the tipper's liability, a tippee incurs liability by knowingly trading on material inside information that directly or indirectly derives from a subject corporation.[65] Thus, Switzer's avoidance of liability and lawful retention of significant profits were owed to the manner in which the affected transaction was structured.

This inconsistency becomes more poignant when the *Chestman*[66] scenario, involving a criminal prosecution, is considered. There, the Second Circuit en banc held that Chestman was not liable under Section 10(b) because his tipper breached no fiduciary duty by conveying material inside information relating to a forthcoming tender offer.[67] Nonetheless, Chestman's criminal conviction under Rule 14e-3 was upheld due to that he knowingly traded

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59 SEC v. Switzer, 590 F. Supp. 756, 758, 762 (W.D. Okla. 1984).

60 *Id.* at 762-64.

61 *Id.* at 766.

62 Dirks v. SEC, 463 U.S. at 660-64; *see supra* notes 41-44 and accompanying text.

63 590 F. Supp. at 764-66.

64 *See* 17 C.F.R. § 240.14e-3(a) (2001).

65 *Id.*; *see* WANG & STEINBERG, *supra* note 10, at 686-91; *supra* notes 45-48 and accompanying text; *infra* note 68 and accompanying text.

66 United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc).

67 *Id.* at 570-71.

while in possession of material nonpublic information relating to a tender offer that derived, directly or indirectly, from a subject corporate source.[68] Thus, while Chestman avoided Section 10(b) liability because his tipper did not unlawfully tip, Chestman was subject to incarceration because, unfortunately for Chestman, the structure of the transaction took the form of a tender offer rather than another feasible acquisition alternative, such as a merger or sale of assets. Such inconsistency cannot be reconciled with market integrity, investor protection, or basic concepts of fair treatment among similar market participants.[69]

The *Chestman* case has another troubling aspect. In ascertaining whether a fiduciary duty existed so as to trigger the disclose or abstain mandate,[70] the Second Circuit held that marriage, standing alone, does not manifest a fiduciary relationship.[71] To have such a relationship of trust and confidence, there must exist other attributes, such as an understanding to keep the material information confidential or a pre-existing pattern of being privy to family business secrets.[72] In addition to minimizing "family values," one can understandably be concerned about the law giving greater sanctity to a shareholder's relationship with a director of a publicly-held company (with whom such shareholder has never spoken or met) than to one's spouse, child, sibling, or parent. Such an approach is

[68] *Id.* at 556-64. Note, moreover, that "Rule 14e-3 does not require that a person charged with violating the rule have knowledge that the nonpublic information in his possession relates to a tender offer." SEC v. Sargent, 229 F.3d 68, 79 (1st Cir. 2000). *Accord*, United States v. O'Hagan 139 F.3d 641, 650 (8th Cir. 1998); Tender Offers, Securities Exchange Act of 1934 Release No. 17,120 (1980) 1980 SEC LEXIS 775.

[69] *See, e.g.*, United States v. Naftalin, 441 U.S. 768, 775-76 (1979) (stating that purposes of Securities Act include "investor protection," achieving "a high standard of business ethics ... *in every facet of the securities industry*," and observing that "the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole.").

[70] *See supra* notes 33-40 and accompanying text.

[71] 947 F.2d at 571 (stating that "Keith's status as Susan's husband could not itself establish fiduciary status").

[72] *Id.* at 568-71. *But see* SEC v. Lenfest, 949 F. Supp. 341, 346 (E.D. Pa. 1996) (holding that a wife could be held liable for trading on material information she received from her husband); United States v. Reed, 601 F. Supp. 685, 712 (S.D.N.Y. 1985) (stating that a "confidential relationship concept ... has reference to any relationship of blood, business friendship, or association in which the parties repose special confidence in each other ... ."), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985).

an outcome of the U.S. Supreme Court's focus on the existence of a fiduciary relationship (or a relationship of trust and confidence) based on state law principles. Without a rule premised on equal access, state law notions of fiduciary duty can trigger, as it did in *Chestman,* an absurd result.[73] By adopting Rule 10b5-2,[74] the SEC effectively has nullified this aspect of *Chestman.* The rule implicates the misappropriation theory under Section 10(b) where a person receives material nonpublic information from a spouse, child, sibling, or parent unless such person can establish that, due to the particular family relationship, there existed no reasonable expectation of confidentiality.[75] One can certainly question whether the SEC's interpretation will be upheld.[76] After all, the Commission in practical effect has "overturned" a decision rendered by the U.S. Court of Appeals.[77]

From an overall perspective, the conclusion seems inescapable that U.S. law on insider trading is far from ideal. Statutes are largely silent on insider trading,[78] thus leaving this subject to the

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[73] In a separate opinion, Judge Winter reasoned:

> [F]amily members who have benefited from the family's control of the corporation are under a duty not to disclose confidential corporate information that comes to them in the ordinary course of family affairs. In the case of family—controlled corporations, family and business affairs are necessarily intertwined, and it is inevitable that from time to time normal familial interactions will lead to the revelation of confidential corporate matters to various family members. Indeed, the very nature of familial relationships may cause the disclosure of corporate matters to avoid misunderstandings among family members or suggestions that a family member is unworthy of trust.

947 F.2d. at 579 (Winter, J., concurring in part and dissenting in part).

[74] 17 C.F.R. § 240.10b5-2 (2001).

[75] *Id.; see* Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,695-97 (Aug. 15, 2000).

[76] *Cf.* The Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (invalidating SEC Rule 19c-4).

[77] *See* Securities Exchange Act Release No. 42,259, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,228, at 82,863-82,864 (1999) (expressing dissatisfaction with *Chestman* as being too restrictive).

[78] Statutory treatment exists with respect to certain issues relating to insider trading, such as "short-swing" trading, option traders, the ability of contemporaneous traders to bring a private right of action, the levying of money penalties, and the adoption of specific mechanisms to be implemented by broker-dealers and investment advisers. *See, e.g.,* Sections 16, 20(d), 20A, 21A of the Securities Exchange Act, discussed in WANG AND & STEINBERG, *supra* note 10, §§ 6.2, 6.3, 6.8, 7.3.3; *supra* notes 17-20 and accompanying text.

courts. The U.S. Supreme Court, rejecting the parity of information and equal access doctrines, has focused on traditional state law issues of fiduciary duty.[79] This approach, in turn, as exemplified by the *Chestman* and *Switzer* cases,[80] has led to illogical lower court decisions. On another front, the SEC, seeking to combat restrictive Supreme Court decisions under the Section 10(b) law of insider trading, has asserted expansive interpretations of those decisions.[81]

The Commission, thus faced with frustration regarding its now limited authority under Section 10(b), has responded by promulgating Rules 14e-3 and Regulation FD.[82] The ultimate consequence is all too often the presence of inconsistent and erratic insider trading regulation that ill serves the investing public. Hence, the U.S. framework on insider trading is not one to be emulated. Other countries evidently agree.[83]

1.2. *Selective Disclosure – Regulation FD*

Unlike many developed securities markets,[84] company selective disclosure practices until recently generally were not proscribed by U.S. law. Unless it could be shown that the insider selectively disclosed with the motivation to personally benefit,[85] this course of conduct (outside of the tender offer context) did not run afoul of the securities laws. In effect, selective disclosure without motivation of personal benefit enabled lawful tipping and tippee trading by select persons based on material information that was not disseminated to the investing public.[86]

The perpetuation of this practice largely was owed to the inadequacy of U.S. insider trading law enunciated by the U.S. Su-

[79] *See supra* notes, 30, 33-35, 50 and accompanying text.

[80] *See supra* notes 59-73 and accompanying text.

[81] *See supra* notes 52-53 and accompanying text.

[82] *See supra* notes 45-48 and accompanying text (Rule 14e-3); *infra* notes 84-115 and accompanying text (Regulation FD).

[83] *See infra* notes 138-93 and accompanying text.

[84] *See infra* notes 195-96 and accompanying text.

[85] *See Dirks*, 463 U.S. at 660-64; *supra* notes 41-44 and accompanying text.

[86] *See* Securities Exchange Act Release No. 42,259, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,846 (SEC 1999) (in proposing Regulation FD opining that, in view of the personal benefit test, "many have viewed *Dirks* as affording considerable protection to insiders who make selective disclosures to analysts, and to the analysts (and their clients) who receive selectively disclosed information.").

preme Court.[87] Frustrated with its inability to effectively address this perceived unfair practice, the SEC promulgated Regulation FD (Fair Disclosure).[88]

Hence, the SEC adopted Regulation FD in response to the perceived unfairness when companies selectively disclose material nonpublic information to analysts, institutional investors, and other securities market insiders. The Regulation's basic premise provides that "when an issuer, or person acting on its behalf, discloses material nonpublic information to [selective] persons . . ., it must make public disclosure of that information."[89] The timing of when the issuer must make such a public disclosure depends on whether the selective disclosure was intentional or non-intentional.

If the selective disclosure is intentional, then the issuer must publicly disclose the information simultaneously by filing or furnishing a Form 8-K to the SEC or in a manner reasonably designed to provide broad distribution of the information. If the selective disclosure is unintentional, then the issuer must disclose the information to the public promptly, but in no event after the later of 24 hours or the opening of the next day's trading on the New York Stock Exchange. Violating Regulation FD exposes the issuer to SEC administrative and civil enforcement action, but does not by itself impose any Section 10(b) antifraud liability on the issuer or establish a private right of action.[90]

1.2.1. Purposes of Regulation FD

The SEC sought to address several concerns by promulgating Regulation FD. First, it believed that issuers often disclose important nonpublic information, such as advance warnings of earnings results, to securities analysts and/or institutional investors before

87 *See* Daniel J. Kramer, *Speaking to the Market Under SEC's Proposed Rules*, N.Y. L.J., May 12, 2000 at 1 (stating that "[i]n contrast to 'tipping,' . . . selective disclosure is not unlawful because it is authorized by the issuer and made to a person who is not bound by a duty of trust or confidence to abstain from using the information for trading."). On occasion, the SEC initiated enforcement action against a subject insider alleging that such person with the intention to personally benefit conveyed material nonpublic information to securities analysts. *See, e.g.*, SEC v. Stevens, SEC Litigation Release No. 12,813 1991 SEC LEXIS 451 (Mar. 19, 1991).

88 Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,676 (Aug. 15, 2000).

89 *Id.* at 83,676.

90 *Id.* at 83,685-88, 83,691-92.

making such information available to the general investing public. The Commission warned that as a result of this practice, the investing public might not believe that they are on an equal playing field with market insiders and may thereby lose confidence in the integrity of the securities markets. Second, the SEC stated that selective disclosure closely resembles the "tipping" of inside information, but noted that the current state of insider trading law may not create liability for an issuer's selective disclosure.[91] Third, the Commission perceived that the integrity of the securities markets was threatened by issuers selectively disclosing information as a means to secure favorable reviews by analysts. Specifically, analysts may feel pressured to report about a company in a positive light or risk losing their access to company personnel. Finally, the SEC opined that recent technological advances, particularly in the communications area, no longer pose undue impediments to timely public disclosure.[92]

1.2.2. Scope of Regulation FD

Regulation FD's scope focuses on those who are prohibited from selectively disclosing material nonpublic information and those to whom such selective disclosure is directed. The Regulation prohibits a company, or persons acting on such company's behalf, from selectively disclosing material inside information regarding such company or its securities.[93] For the purpose of the Regulation, an issuer includes a company that has a class of secu-

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[91] "[I]n light of the 'personal benefit' test set forth in the Supreme Court's decision in *Dirks v. SEC*, 463 U.S. 646 (1983), many have viewed issuer selective disclosures to analysts as protected from insider trading liability." *Id.* at 83,677 n.7. Nevertheless, the Commission reiterated that it would institute enforcement actions based on violations of Section 10(b) where selective disclosures violated the insider trading prohibitions. *Id.; see supra* notes 52, 87.

[92] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154 [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 at 83,677-78; *see also* J. Robert Brown, Jr., *Corporate Communications and the Federal Securities Laws*, 53 GEO. WASH. L. REV. 741, 808 (1985) (observing that "companies often attempt to maintain positive working relations with analysts, selectively tipping information to particular analysts . . . ."); Robert A. Prentice, *The Internet and Its Challenges for the Future of Insider Trading Regulation*, 12 HARV. J. L. & TECH. 263, 329 (1999) (stating that "there is a strong incentive for an issuer to disclose to an analyst, given the good that analysts can do for a company's stock price.").

[93] Regulation FD, 17 C.F.R. § 243.100(a) (2000).

rities registered under Section 12 of the Exchange Act or is required to file reports under Section 15 of that Act.[94]

Regulation FD defines a "person acting on behalf of an issuer" as "any senior official of the issuer ... or any other officer, employee, or agent of an issuer who regularly communicates with any [enumerated recipient of information discussed below] ..., or with holders of the issuer's securities."[95] This definition focuses on those whose job function regularly entails the disclosure of company-related information to the enumerated recipients. Selective disclosure by personnel who may occasionally interact with analysts or investors, for example, would not give rise to liability under Regulation FD. Thus, material nonpublic information disclosed in the due course of business to customers and suppliers would be outside the scope of the Regulation. The Commission, however, has noted that a senior official cannot escape liability by directing non-covered personnel to make a selective disclosure of information to someone within the classes of enumerated recipients. In such a case, the senior official would be held responsible for making the selective disclosure under Section 20(b) of the Exchange Act. Finally, the definition of a "person acting on behalf of an issuer" specifically excludes an "officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer."[96] Such conduct would violate the insider trading prohibitions.[97]

Regulation FD applies when material nonpublic information is selectively disclosed to one of four enumerated classes of recipients outside the issuer:

- a broker or a dealer, or a person associated with a broker or dealer;
- an investment adviser, an institutional investment manager, or a person associated with either;
- an investment company or affiliated person thereof;

or

[94] *Id.* § 243.101(b). Among other entities, the Regulation expressly excludes from the definition of "issuer" any foreign government or foreign private issuer.

[95] *Id.* § 243.101(c). The Regulation defines "senior official" as "any director, executive officer, investor relations or public relations officer, or other person with similar functions." *Id.* § 243.101(f).

[96] *Id.* § 243.101(c).

[97] *See supra* notes 41-44 and accompanying text.

- a holder of the issuer's securities, where it is reasonably foreseeable that the holder will purchase or sell the issuer's securities based on the information.[98]

The Regulation expressly excludes, and thus does not apply to, the following: a "person who owes a duty of trust or confidence to the issuer" (e.g., temporary insider); a "person who expressly agrees to maintain the disclosed information in confidence"; a credit rating agency, "provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available"; and, with certain exceptions, in connection with "a securities offering registered under the Securities Act."[99] Furthermore, although not specifically referenced, disclosures to the media or communications to government agencies are outside the Regulation's scope.

1.2.3. Meaning of "Material" and "Nonpublic"

Although the Regulation refers to "material" and "nonpublic" information, it does not define those terms. Instead, the SEC relies on case law to define these terms. Thus, information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision . . . [and it is] a fact [that] would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[100] Information is nonpublic "if it has not been disseminated in a manner making [such information] available to investors generally."[101]

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[98] *See* 17 C.F.R. § 243.100(b)(1)(i)-(iv).

[99] *Id.* § 243.100(b)(2). The Regulation lists attorneys, investment bankers, and accountants as examples of those who may owe a duty of trust or confidence to the issuer. *Id.* § 243.100(b)(2)(i).

[100] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154 [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,683 (Aug. 15, 2000), *quoting* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). The Regulation FD Release also cites SEC Staff Accounting Bulletin No. 99 (Aug. 12, 1999) (64 FR 45150) as authority supporting its definition of "materiality." *See* Ganino v. Citizens Utils. Co., 228 F.3d 154 (2d Cir. 2000).

[101] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154 [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,683 (Aug. 15, 2000), *citing* SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc).

Although the Commission declined to establish a bright-line test for materiality, it offered several examples of information that likely would require issuers to make a materiality determination: (1) earnings information; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries, or developments regarding customers or suppliers; (4) changes in control or in management; (5) change in auditors; (6) events regarding the issuer's securities; and (7) bankruptcies or receiverships. With this or any other information, the key for any materiality determination is what significance a reasonable investor would place on the information.[102]

1.2.4. Intentional or Non-Intentional Selective Disclosure

Another important issue under Regulation FD involves whether the issuer selectively disclosed the information intentionally or non-intentionally. This assessment determines when the issuer must make the information publicly available. If the issuer intentionally and selectively discloses material nonpublic information, then it must disclose the same information simultaneously to the public. But if the selective disclosure is non-intentional, the issuer must disclose the information promptly, which is defined:

> as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer ... learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.[103]

The standard for determining whether a selective disclosure was "intentional" meshes with the Regulation's definitions of materiality and nonpublic. The Regulation defines "intentional" to mean that "the person making the disclosure either knows, or is

[102] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154 [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,684 (Aug. 15, 2000). The SEC acknowledges that this information is not material per se. *Id.*

[103] 17 C.F.R. § 243.101(d) (2000).

reckless in not knowing, that the information he or she is communicating is *both* material and nonpublic."[104] Thus, if an issuer were merely negligent in erroneously judging whether a certain piece of selectively disclosed information is either material or nonpublic, Regulation FD would not impose liability. By using this standard, the Commission seeks to provide "additional protection that issuers need not fear being second-guessed by the Commission in enforcement actions for mistaken judgments regarding materiality in close cases."[105] Nonetheless, the SEC warned that the determination of materiality should take into account all facts and circumstances. Thus, for example, a materiality judgment that might not be reckless in the context of an impromptu answer to an unexpected question at a press conference may be reckless in the context of a prepared written statement where the issuer has more time to evaluate the information it is about to disclose. Furthermore, if an issuer displays a pattern of "mistaken" judgments regarding materiality, that company's credibility would be harmed when it comes to future claims that any particular disclosure was not intentional.

1.2.5. Methods For Making Public Disclosure

Regulation FD provides issuers with flexibility in determining how to publicly disclose material nonpublic information when they have engaged in selective disclosure of such information. Whatever method the issuer chooses must be "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[106] One clear method that an issuer can use is either to file or furnish a Form 8-K with the SEC.[107] The

[104] 17 C.F.R. § 243.101(a) (2000) (emphasis added).

[105] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154 [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,685 (Aug. 15, 2000) (stating that "in the case of a selective disclosure attributable to a mistaken determination of materiality, liability will arise only if no reasonable person under the circumstances would have made the same determination.").

[106] 17 C.F.R. § 243.101(e)(2) (2000).

[107] 17 C.F.R. § 243.101(e)(1) (2000). With respect to "filing" versus "furnishing" the information on Form 8-K, the SEC stated:

> [I]ssuers may choose either to "file" a report under Item 5 of Form 8-K or to "furnish" a report under Item 9 of Form 8-K that will not be deemed "filed." If an issuer chooses to file the information on Form 8-K, the information will be subject to liability under Section 18 of the Exchange Act. The information also will be subject to automatic incorporation by

Regulation also provides that other methods of public disclosure may be acceptable, such as press releases, press conferences, or conferences that the public can attend or listen to by telephone or teleconference. In using these alternatives, however, the issuer must select a method or combination of methods that are reasonably calculated to provide a broad and effective public disclosure given that issuer's particular circumstances. Thus, for example, an issuer cannot rely solely on issuing a press release if it knows that its press releases are not routinely reported by the wire services. Furthermore, even though the Internet can be an effective method of disclosing information in conjunction with other methods, issuers cannot simply post information on their own Internet website as a sole means to satisfy Regulation FD's public disclosure requirements. In addition, the Commission will take into account whether a company deviated from its usual practices for making a public disclosure in determining whether the method of disclosure in any particular case complies with the Regulation.[103]

The SEC, recognizing that a single method of disclosure may not be possible or desirable, offered a model for making a planned disclosure of material information. First, the issuer should issue a press release distributed through regular channels. Second, it should provide adequate notice through a press release and/or website posting of a scheduled conference call to discuss the particular information, giving investors information on the time and date of the call as well as how to access it. Third, the issuer should hold the conference call in an open manner, such that investors can listen to (but not necessarily ask questions during) the conference call either over the telephone or the Internet. The Commission also

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> reference into the issuer's Securities Act registration statements, which are subject to liability under Sections 11 and 12(a)(2) of the Securities Act. If an issuer chooses instead to furnish the information, it will not be subject to liability under Section 11 of the Securities Act or Section 18 of the Exchange Act for the disclosure, unless it takes steps to include that disclosure in a filed report, proxy statement, or registration statement. All disclosures on Form 8-K, whether filed or furnished, will remain subject to the antifraud provisions of the federal securities laws.

Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,687 (Aug. 15, 2000).

[103] Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,688 (Aug. 15, 2000).

suggested that companies make taped replays of the conference call available for some time after they take place so as to allow other investors to listen to it.[109]

1.2.6. Exclusions

Because Regulation FD's disclosure requirements potentially could have conflicted with concerns relating to an issuer's "conditioning the market" during a registered offering, the Regulation generally "does not apply to disclosures made in connection with a securities offering registered under the Securities Act."[110] Registered shelf offerings, however, fall within Regulation FD's scope. Similarly, a reporting company's unregistered offerings are subject to Regulation FD. The Commission noted that in the context of such offerings, the company should either make selectively disclosed information public or secure a confidentiality agreement from the recipient. It also warned public companies undertaking unregistered offerings that if they fail to adhere to Regulation FD, they may risk losing their exemption from registration. A company's failure to adhere to Regulation FD, however, will not cause it to lose the availability of using short-form Securities Act registration forms S-2 or S-3 or cause its shareholders to lose their ability to sell their securities under Securities Act Rule 144(c).[111]

1.2.7. SEC Enforcement, No Private Remedy

If an issuer violates Regulation FD, it will be subject to SEC enforcement action. The Commission, for example, could institute an administrative action seeking a cease-and-desist order or a civil action requesting an injunction and/or money penalties. The SEC also could bring administrative or civil actions against individuals affiliated with issuers who are responsible for violating the Regulation.[112] The Regulation, however, does not create any private right of action. Furthermore, it expressly does not establish any Section 10(b) antifraud liability for cases based "solely" on an is-

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[109] *Id.* ¶ 83,688 n.73.

[110] *Id.* ¶ 83,689.

[111] *See* 17 C.F.R. § 243.103 (2000).

[112] *See* STEINBERG & FERRARA, *supra* note 16, §§ 4:07, 5:02-5:07, 5A:08-5A:18.

suer's failure to comply with Regulation FD.[113] Nevertheless, Section 10(b) liability may still arise if, for example, the company's public disclosure, designed to satisfy Regulation FD, contains a material misstatement or omits material information.

1.2.8. Impact of Regulation FD

Critics of Regulation FD contend that it will have a "chilling effect" on issuers' dissemination of information.[114] They believe that the Regulation will deter companies from disclosing certain information out of a concern for violating the Regulation. As a result, investors will end up receiving less, not more, information. The SEC, however, contends that the Regulation admirably serves investor interests, levels the "playing field," and has no "chilling effect." According to the SEC, the Regulation has been sufficiently tailored to provide meaningful safeguards against inappropriate liability. Moreover, the discipline and culture of the securities markets will continue to induce issuers to disclose information necessary for investors to make informed decisions.[115]

1.3. Duty to Promptly Disclose – "The Black Hole"

In developed securities markets, it is axiomatic that, absent sufficient business justification, material nonpublic information must be promptly disclosed to the affected securities market(s).[116] Perhaps to the surprise of many outside observers, although this policy is espoused by stock exchange rules (that are rarely enforced against listed companies),[117] U.S. law does not require companies to disclose material nonpublic information during the interval

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[113] *See* 17 C.F.R. § 243.102 (2000) ("No failure to make a public disclosure required solely by [Regulation FD] shall be deemed to be a violation of Rule 10b-5 . . . under the Securities Exchange Act.").

[114] *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,679 (Aug. 15, 2000).

[115] *See id.* ¶ 83,677. *See generally* Robert J. Conner, *Regulation FD: Its Creation, Its Authority, Its Possible Impact*, 28 SEC. REG. L.J. 233, 278 (2001) (noting that "the SEC will attain the goal it set out to accomplish with Regulation FD: to promote investor confidence in the fairness and integrity of the securities markets."); James J. Junewicz, *The SEC Raises the Stakes in Issuer–Analyst Communications*, 33 REV. SEC. & COMM. REG. 237 (2000).

[116] *See infra* notes 199-208 and accompanying text.

[117] *See, e.g.*, New York Stock Exchange Company Manual §§ 202.01-202.06, 3 Fed. Sec. L. Rep. (CCH) ¶¶ 23,513.

between the filing of periodic reports with the SEC.[118] Nonetheless, if, for example, the company is issuing or trading its securities in the markets,[119] has a duty to update previous disclosures made,[120] or rumors are prevalent that are attributable to the company,[121] then affirmative disclosure is required.[122]

This "black hole" in the U.S. continuous disclosure framework, in practical effect, occurs most frequently where adverse financial information exists relating to the subject company (also called "bad news").[123] Absent sound business reasons, companies normally are pleased to promptly disclose positive information. But with respect to bad news, such as the probable failure to meet analysts' earnings projections or the loss of a major contract, issuers are reluctant to make prompt disclosure. The discipline of the market for companies that fail to meet analysts' expectations has become

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[118] *See* Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984). The SEC has issued a number of statements urging companies to make full and prompt public disclosure of material developments. *See, e.g.*, Timely Disclosure of Material Corporate Developments, Securities Act Release No. 5,092 (Oct. 5, 1970) ("Notwithstanding the fact that a company complies with [its] reporting requirements, it still has an obligation to make full and prompt announcements of material facts regarding the company's financial condition."); *accord*, Report of Investigation in the Matter of Sharon Steel Corporation as It Relates to Prompt Public Disclosure, Exchange Act Release No. 18,271, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,049 (1981). Nonetheless, these pronouncements are merely hortatory in nature. *See* MARC I. STEINBERG, CORPORATE INTERNAL AFFAIRS: A CORPORATE AND SECURITIES LAW PERSPECTIVE 19 (1983) (asserting that "the hallmark of the SEC's exhortatory approach . . . generally has been that it seeks to ameliorate or address particular weaknesses in the corporate accountability mechanism without the imposition of government regulation"); *see also* 7 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3517 (3d ed. 1991); Theresa A. Gabaldon, *The Disclosure of Preliminary Merger Negotiations as an Imperfect Paradigm of Rule 10b-5 Analysis*, 62 N.Y.U. L. REV. 1218, 1264 (1987); Dennis S. Karjala, *Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law*, 80 NW. U. L. REV. 1473, 1537 (1986).

[119] *See* Greenfield v. Heublein, Inc., 742 F.2d 751, 756 (3d Cir. 1984); *supra* notes 33-34 and accompanying text.

[120] *See, e.g.*, Rubinstein v. Collins, 20 F.3d 160, 170 n.41 (5th Cir. 1994) (stating that "it appears that defendants have a duty under Rule 10b-5 to correct statements if those statements have become materially misleading in light of subsequent events.").

[121] *See* State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843, 850 (2d Cir. 1981) ("A company has no duty to correct or verify rumors in the marketplace unless those rumors can be attributed to the company.").

[122] *See* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 10.01 (3d ed. 2001).

[123] "Bad news" generally refers to those circumstances that adversely impact the subject company or the market for its securities.

commonplace.[124] Although companies likely will incur the wrath of analysts and other constituencies by delaying disclosure of material information, until such adverse information becomes a certainty with its accompanying negative consequences, it is not surprising that many companies decline to promptly disclose with the hope that positive developments will ensue.[125]

The arbitrariness of this "black hole" in the U.S. securities framework also is illustrated by the fortuity of when the adverse event transpires. For example, after filing its periodic report on Form 10-Q[126] with the SEC on May 15, the company learns of material bad news on May 17. Unless there exists an independent affirmative disclosure obligation,[127] the company has no duty under the securities laws to disclose this material adverse information until the filing of its next Form 10-Q on August 15, nearly three months later. Such delayed disclosure, in the absence of justifiable business reason, is difficult to reconcile with the perception that the mandatory disclosure framework in the United States uniformly promotes market integrity and investor entitlement to material information.[128]

Accordingly, the key issue in this setting is one of timing. Companies understandably wish to delay disclosure of bad news as long as possible. For example, during the interim when the next Form 10-Q is due, perhaps new major contracts can be obtained to replace the ones that were terminated. Prompt disclosure, according to management, could induce a "snowball" effect, depressing the corporation's business and the price of its securities.[129]

As alluded to above, there is sparse authority to support an affirmative obligation to disclose bad news during the period between SEC mandated reports. Courts have reasoned that the timing of disclosure normally is a matter of business judgment. Under

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[124] *See, e.g.*, Robert O'Brien, *Compaq's Warning Stings Techs; IBM, Hewlett-Packard, Dell Fall*, WALL ST. J., Dec. 14, 2000, at C4.

[125] *See* Jonathan Weil, *Many Companies Fail to Heed the SEC On Its Revenue-Recognition Guidelines*, WALL ST. J., Dec. 14, 2000, at C1; *see also*, Marc Steinberg, *supra* note 32 § 2.03[1] (opining that the "black hole" "should not be viewed in an unduly expansive manner" and that "an issuer's disclosure duties are continual and comprehensive").

[126] 17 C.F.R. § 249.308a (2000).

[127] *See supra* notes 119-22 and accompanying text.

[128] *See* Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983).

[129] *See* STEINBERG, *supra* note 32, § 2.03[6].

this approach, disclosure may be delayed until the information is ripe, or withheld if a valid business reason exists, such as where premature disclosure would impair a contract.[130]

Even when such business justification is absent, issuers nonetheless generally may delay making disclosure under the U.S. securities laws until the filing of the next SEC periodic report.[131] It may be argued, however, that where the material information is ripe and the business justifications are lacking, U.S. law ought to mandate prompt disclosure.[132]

Although a company's refusal to disclose material adverse information for fear of investor response does not justify withholding disclosure, plausible arguments against the blanket imposition of an affirmative duty to disclose material adverse information may be promoted. Coping with the vicissitudes of business is a basic tenet of entrepreneurship. Corporate management should retain the flexibility to overcome setbacks. Stockholder confidence in management's ability to exercise its stewardship is a key basis underlying shareholders' investment in that enterprise. Moreover, the securities laws were not designed to stifle management's ability to run the corporation's daily business operations. In light of these concerns, the present SEC periodic reporting regime mandates comprehensive disclosure at specified intervals and also provides management some breathing room.[133] Allowed time to reflect, the company may find a means to salvage or replace the "terminated" contracts or otherwise reverse the setback. Requiring immediate disclosure may induce panic selling, depressing the corporation's business and the price of its stock.

As recognized by other countries,[134] however, absent sufficient business justification, market integrity and investor confidence call

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130 *See, e.g.*, Reiss v. Pan Am. World Airways, Inc., 711 F.2d 11 (2d Cir. 1983).

131 *See supra* notes 117-21 and accompanying text.

132 *Cf.* Flynn v. Bass Bros. Enters., Inc., 744 F.2d 978 (3d Cir. 1984) (setting forth certain circumstances for mandating disclosure of "soft" information).

133 *See* STEINBERG, *supra* note 32, § 2.03[6]; Marc I. Steinberg & Robin M. Goldman, *Issuer Affirmative Disclosure Obligations—An Analytical Framework for Merger Negotiations, Soft Information, and Bad News*, 46 MD. L. REV. 923, 946-951 (1987). Moreover, disclosure of forward-looking information may be required in SEC periodic reports pursuant to Item 303 of Regulation S-K, Management Discussion and Analysis (MD&A). *See, e.g.*, SEC Financial Reporting Release No. 36, Exchange Act Release No 26,831, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,436 at 62,143 (May 18, 1989).

134 *See infra* notes 199-208 and accompanying text.

for adverse material information to be publicly disclosed without undue delay. The issue is principally one of materiality rather than one of timing. If there exists no reasonable likely prospect of significantly minimizing the material adverse effect of whatever event occurred, there should be no legitimate basis for delaying disclosure until the next periodic filing. In such event, the fundamental issue should be whether the subject information is material. Investors should be entitled to such material information to enable them to protect their financial holdings as they see fit. Prompt disclosure normally is critical, because delay can have catastrophic consequences for investors as well as the integrity of the financial markets.

The SEC, by leaving it to corporations in the interval between periodic reports to voluntarily make prompt disclosure of material information, has slighted investors and its own responsibility to facilitate the disclosure objectives underlying the securities laws. To remedy this deficiency, the SEC should amend Form 8-K[135] so as to mandate prompt disclosure of any event which a company knows or has reason to know will have a material impact on that enterprise. Mandated disclosures, for instance, would encompass (if financially material): the irretrievable loss of client contracts, known problems which generate liquidity problems, and the occurrence of any situation which affects the issuer's net sales, revenues or income.[136]

Arguably, an exception to such mandated disclosure should be allowed where there exist an identifiable and rational basis for the belief that the corporate setback is reasonably likely to be significantly minimized in the immediate future, a considered plan for achieving this goal is diligently implemented, and prompt public disclosure of the subject information would pose a substantial probability of harm to the corporation's continued viability. Without compliance with the foregoing steps, shareholders and the securities markets are entitled to prompt disclosure of material information.[137]

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135 17 C.F.R. § 249.308 (2000).

136 *See* STEINBERG, *supra* note 32, § 2.03[6].

137 *Id. See generally* Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 127 (1999) (asserting that corporate governance will improve in the event that disclosure becomes legally mandated); Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 675 (1999) (discussing a framework under

2. DEVELOPED MARKETS ABROAD

2.1. *Insider Trading*

Unlike the United States where the law of insider trading largely has been formulated by the courts,[138] countries abroad have enacted specific and detailed legislation defining the contours of the insider trading prohibition.[139] Regardless of this codification approach, ambiguities exist in such legislation that await judicial or legislative resolution.[140]

2.1.1. *Use of Statutorily Defined Terms*

Unlike the United States, key terms constituting the insider trading offense are set forth by statute.[141] By way of example, the United Kingdom ("U.K.") defines inside information as information that "(1) relates to particular securities or their issuers; (2) is specific or precise; (3) has not been made public; and (4) if it were made public would be likely to have a significant effect on the price or value of any security."[142] An "insider fact" under German

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which one might resolve the question of whether a firm conducting a public offering must disclose information regarding the fiscal quarter in which the offering takes place); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1 (1999).

138 *See supra* notes 21-48 and accompanying text.

139 *See infra* notes 141-86 and accompanying text.

140 *See infra* notes 147-49 and accompanying text.

141 *See infra* notes 142-59 and accompanying text.

142 Criminal Justice Act 1993 (CJA), ch. 36 part V, §§ 56, 60(4), as set forth in ALISTAIR ALCOCK, *United Kingdom* in INTERNATIONAL SECURITIES REGULATION vol. 5, bklt. 1, at 27 (Robert Rosen ed. 2001).

In 1989, the Council of the European Communities promulgated the European Economic Community Directive Coordinating Regulation on Insider Trading. Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Dealing, 1989 O.J. (L 344) 30 (the "Directive"). The Directive, for example, sets forth minimum standards for defining the concepts of "inside information" and "insider" with respect to which Member States of the European Union must comply. *Supra* art. 5. Nonetheless, significant details regarding methods of enforcement are left principally to the Member States. Directive, *supra*, art. 8; *see* ISABELLE PINGEL, *The EC Directive of 1989*, *in* INSIDER TRADING: THE LAWS OF EUROPE, THE UNITED STATES AND JAPAN 5, 5-6 (Emmanuel Gaillard ed. 1992).

Article 1 of the Directive provides that inside information is "information which has not been made public of a precise nature . . . which, if it were made public, would be likely to have a significant effect on the price of the . . . security." Directive, *supra*, art. 1. Article 2 sets forth that an insider is "any person who . . . by virtue of his membership of the administrative, management or supervisory law is "knowledge of a fact not publicly known relating to one or more issuers of insider securities or to insider securities and which fact is capable of substantially influencing the price of the insider securities in the event of it becoming publicly known."[143] For insider trading purposes, "privileged information" under Mexican law is that "arising from the issuer and not available to the public, the knowledge of which may influence the prices of securities issued by such corporation or another corporation."[144] Other countries similarly define by statute the elements of an inside fact or privileged information.[145] In addition, other key concepts are defined by statute, including, for instance, those persons who are deemed: insiders, to have a "special relationship" with the company, or to have "access" to inside information.[146]

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bodies of the issuer, by virtue of his holding in the capital of the issuer, or because he has access . . . by virtue of the exercise of his employment, profession or duties, possesses inside information [and takes] advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer . . . to which that information relates." Directive, *supra*, art. 2. Article 4 provides that a "secondary insider" is "any person [other than a primary insider] who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a [primary insider]." Directive, *supra*, art. 4.

The Directive, providing minimum standards only, leaves to the judgment of the Member States whether to adhere to more stringent requirements than those promulgated in the Directive. Directive, *supra*, art. 6. The Directive mandates that each Member State designate competent authorities "to ensure that the provisions adopted pursuant to [the] Directive are applied [and that those authorities] be given all supervisory and investigatory powers that are necessary for the exercise of their functions." Directive, *supra*, art. 6. The Directive declines to require whether administrative, civil or criminal sanctions should be implemented by each Member State for enforcement purposes. Rather, Article 13 provides that "[e]ach Member State shall determine the penalties to be applied for infringement of the measures taken pursuant to [the] Directive." Pincus at 6-21; STEINBERG, *supra* note 1, at 122-123.

[143] Securities Act § 13; *see* Tony Hickinbotham & Christoph Vaupel, *Germany*, *in* INTERNATIONAL INSIDER DEALING 129, 134 (Mark Stamp & Carson Welsh eds., 1996).

[144] Securities Market Law art. 16-Bis; *see* Antje Zaldivar, *Mexico*, *in* INTERNATIONAL INSIDER DEALING 63, 64-67 (Mark Stamp & Carson Welsh eds., 1996).

[145] *See, e.g.*, Commission des Opérations de Bourse ("COB"), Regulation No. 90-08 (Fr.); Consolidated Act on Financial Intermediation Art. 180, para. 3, implemented by CONSOB Regulation No. 11520 (Italy). *See also* STEINBERG, *supra* note 1, at 130-32, 138-39.

[146] *See, e.g.*, Directive, *supra*; Corporations Law § 1002G(1) (Austl.); Securities Act R.S.O., ch. S-5, § 76(1), 76(5) (1991) (Can.).

Note that a number of interpretive issues remain under these statutes. Under the U.K. framework, for example, when is information "specific or precise" rather than general or not specific? Is information relating to the issuer engaging in relatively preliminary merger negotiations with a prospective suitor precise or not sufficiently specific for purposes of the statute?[147] Under German law, when is a fact not publicly known so as to become an "insider fact"?[148] And, under Mexican law, with respect to the term "privileged information," under what circumstances is such information deemed to "arise from the issuer"? Does the statute encompass purely nonpublic market information relating to an issuer (rather than internal corporate information) that influences the subject security's trading price?[149]

Also, contrary to the U.S. definition, the concept of materiality is connected to the information's impact on market price.[150] The U.S. standard, focusing on whether the subject information would

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[147] The ambiguity of the United Kingdom's definition of inside information has been criticized. *See* MARK STAMP & CARSON WELSH, *United Kingdom, in* INTERNATIONAL INSIDER DEALING 91, 100 (1996). Note that the French judiciary has held that "privileged information" encompasses negotiations relating to a prospective takeover offer by a French company seeking to acquire the securities of a publicly-held U.S. corporation. *See* CA Paris, 6 July 1994, *Les Petites Affiches (Petites Affiches)* No. 137, 16 Nov. 1994, p. 17, note Ducouloux-Favard, *discussed in* Patricia Peterson, *France, in* INTERNATIONAL INSIDER DEALING 152, 156 (Mark Stamp & Carson Welsh eds., 1996).

[148] *See* Hartmut Krause, *The German Securities Trading Act (1994): A Ban on Insider Trading and an Issuer's Affirmative Duty to Disclose Material Nonpublic Information*, 30 INT'L LAW. 555, 562 (1996) ("Neither the German Act nor the EC Insider Trading Directive offer guidance as to when information should be considered known to the public."). For a comparison, see the Australian Corporations Law, which states that information is generally available if:

> (a) it consists of readily observable matter; or (b) without limiting the generality of paragraph (a), both the following subparagraphs apply: (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.)

Corporations Law § 1002B(2). (Austl.)

[149] A construction limiting the statute to internal corporate information arising from the subject issuer would be unduly narrow, allowing a large gap in the Mexican securities framework. *Cf.* United States v. O'Hagan, 521 U.S. 642 (1997) (applying Exchange Act § 10(b) to material inside information arising from prospective takeover bidder).

[150] *See infra* notes 153-59 and accompanying text.

assume importance to the mythical "reasonable" investor in making his investment decision,[151] has not been adopted with great frequency elsewhere.[152] To illustrate the widespread rejection of the U.S. definition of materiality, the laws of the following jurisdictions focus their inquiry on the information's effect on the market price of the subject security: (Ontario) Canada,[153] Mexico,[154] United Kingdom,[155] France,[156] Germany,[157] Italy,[158] and Australia.[159] Indeed, relatively few countries, such as Japan,[160] follow the U.S. approach.

Hence, although awaiting judicial clarification for unresolved issues, the insider trading statutes outside of the United States set forth the key terms and definitions that comprise the offense. As will be examined below, the fiduciary duty (or trust and confidence) analysis embraced by the U.S. Supreme Court has been broadly rejected elsewhere.[161]

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[151] *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

[152] *See* Article 1 of the EC Directive on Insider Trading, *supra* note 142; *infra* notes 153-59 and accompanying text.

[153] Securities Act, R.S.O. ch. S-5, § 1(1) (1990) (Can.) (defining a material fact as a "fact that significantly affects or would reasonably be expected to have a significant effect on, the market price or value of securities [of the subject issuer].").
Note that there is no federal securities law in Canada. Rather, regulation is provided by each of that country's ten provinces and two territories. The Ontario securities legislation is viewed as the most significant and will be used as the exemplar in this article. *See* generally, Philip Anisman, *The Proposals for a Securities Market Law for Canada: Purpose and Process*, 19 OSGOODE HALL L.J. 329 (1981).

[154] Securities Market Law art. 16-Bis.

[155] Criminal Justice Act § 60(4).

[156] Commission des Opérations de Bourse Art. 1 (defining privileged information as "any precise non-public information ... which, if made public, might affect the price of the security.").

[157] Securities Act § 13.

[158] Consolidated Act on Financiál Intermediation Art. 180, para. 3. *Cf.* former Law No. 157 art. 3. *See* Casella, *Italy*, in INSIDER TRADING: THE LAWS OF EUROPE, THE UNITED STATES AND JAPAN 109, 112-13 (E. Gaillard ed., 1992). *See generally* Eugenio Ruggiero, *The Regulation of Insider Trading in Italy*, 22 BROOK. J. INT'L L. 157 (1996).

[159] Corporations Law § 1002G(1) (setting forth that the information, if it were generally available, "might have a material effect on the price or value of [the subject] securities").

[160] Securities and Exchange Law art. 166, para. 2 (defining material facts as encompassing those facts "which may have significant influence on the investment decisions of investors"); *see* STEINBERG, *supra* note 1, at 146 (and sources cited therein).

[161] *See infra* notes 162-86 and accompanying text.

2.1.2. *General Adherence to the "Access" Standard*

Not surprisingly, other jurisdictions soundly have rejected the U.S. fiduciary relationship (or relationship of trust and confidence) model to define the scope of illegal insider trading and tipping.[162] First, the U.S. approach focuses on the presence or absence of relatively complex inquiries to ascertain whether the insider trading proscription prevails in the particular setting. For example: Is there a fiduciary relationship present?[163] What type of relationship is deemed to be fiduciary or one of trust and confidence?[164] Who is a quasi-insider and under what circumstances?[165] What facts must be shown for there to be misappropriation of the subject information?[166] Must the inside trader in fact "use" or merely be "in possession of" the subject information at the time of the transaction(s)?[167] What must be established to prove that one tipped for "personal benefit" and what constitutes an "improper personal benefit?"[168] To leave these inquiries to ad hoc adjudication and occasional SEC rulemaking[169] may be tolerable for the United States with its zest for litigation and its abundance of lawyers, regulators, and judges. Such an approach, representing the antithesis of cost-effectiveness, justifiably garners little support elsewhere.[170]

Moreover, as a matter of fairness, the U.S. framework has significant loopholes. For example, should the loose-lipped executive and her tippees avoid insider trading liability when those tippees knowingly trade on material nonpublic information?[171] Should one be criminally convicted or be totally exonerated on the sole

[162] *See infra* notes 176-86 and accompanying text.

[163] *See* Chiarella v. United States, 445 U.S. 222 (1980); *supra* notes 33-37 and accompanying text.

[164] *See* United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc); *supra* notes 66-72 and accompanying text.

[165] *See* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).

[166] *See* United States v. O'Hagan, 521 U.S. 642 (1997); United States v. Chestman, 947 F.2d 551.

[167] *See* SEC Rule 10b5-1, 17 C.F.R. § 240.10b5-1 (2001); *supra* notes 52-53, 81 and accompanying text.

[168] *See* SEC v. Switzer, 590 F. Supp. 756 (W.D. Okla. 1984); *supra* notes 59-65 and accompanying text.

[169] *See, e.g.*, SEC Rules 10b5-1 and 10b5-2, 17 C.F.R. § 240.10b5-1, 240.10b5-2 (2001); *supra* notes 52-53, 74-77 and accompanying text.

[170] *See infra* notes 176-93 and accompanying text.

[171] Today, such conduct is governed by Regulation FD. *See supra* notes 84-115 and accompanying text.

distinction whether the confidential information related to a tender offer rather than a merger transaction?[172] Should a close relative or good friend be able to legally trade on material nonpublic information when he inadvertently learns of such information when visiting the insider at her home or office?[173] By adhering to a fiduciary relationship like-model that has been rejected by the SEC in the tender offer scenario,[174] the U.S. insider trading approach unduly complicates an already complex area and at times smacks of unfairness among similarly situated market participants.[175]

For these reasons, many countries opt for an insider trading proscription premised on the "access" doctrine.[176] As a generalization, this standard prohibits insider trading by those who have unequal access to the material nonpublic information. This concept may extend the insider trading prohibition to tippees who receive the subject information from traditional insiders or others who, due to their office, employment, or profession, have access to such information.[177] This general approach is implemented by such jurisdictions as, for example, the United Kingdom,[178] France,[179] Germany,[180] Italy,[181] (Ontario) Canada,[182] and Mexico.[183]

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172 *See* United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc); *supra* notes 58-83 and accompanying text.

173 *Cf.* T.G.I. Paris, Oct. 15, 1976, J.C.P. 1977, II, 18543 (architect deemed insider due to his becoming privy to confidential information while visiting his client's office), *discussed in* Dominique Borde, *France*, *in* INSIDER TRADING IN WESTERN EUROPE: CURRENT STATUS 59, 65 (Gerhard Wegen & Heinz-Dieter Assmann eds., 1994).

174 *See* Rule 14e-3, 17 C.F.R. § 240.14e-3 (2001); *supra* notes 45-48 and accompanying text.

175 *See supra* notes 49-83 and accompanying text.

176 EC Directive on Insider Trading, note 142 *supra*; *infra* notes 178-83 and accompanying text.

177 EC Directive on Insider Trading, note 142 *supra*.

178 *See* Criminal Justice Act §§ 52, 57; *infra* note 188 and accompanying text.

179 Hence, under Regulation 90-08, the following are defined as insiders:

> (a) [P]ersons holding privileged information by reason of their capacity as members of management, board of directors of an issuer, or by reason of their functions which they exercise with respect to an issuer; (b) [p]ersons holding privileged information by reason of the planning and execution of a financial operation; (c) [p]ersons to whom privileged information is disclosed during the exercise of their professional activities or functions; and (d) [p]ersons who, with full knowledge of the facts, possess privileged information originating directly or indirectly from [any of the foregoing insiders].

Regulation 90-08. *See* STEINBERG, *supra* note 1, at 138.

A significantly smaller number of jurisdictions opt for an expansive approach premised on the parity of information principle.[184] For example, Australia's prohibition against insider trading generally extends to any person or entity who possesses confidential price sensitive information.[185] Under the Australian framework, one is deemed an insider, thereby becoming subject to the insider trading and tipping proscriptions, by "(a) possess[ing] information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and (b) ... know[ing], or ought reasonably know[ing] that (i) the information is not generally available; and (ii) if it were generally available, it might have a material effect on the price or value of those securities."[186]

2.1.3. *Tipping Liability*

With respect to tipping, like the liability of insiders and access persons for trading, the U.S. approach has been thoroughly rejected. The standards adopted by other jurisdictions cover a wide spectrum. At one end, for example, is Australia that subjects any tippee (regardless how remote), who knowingly possesses material nonpublic information, from trading on or tipping such information.[187] Similarly, the United Kingdom imposes a broad prohibition against trading and tipping for those who knowingly receive material nonpublic information, directly or indirectly, from an insider.[188] Perhaps at the other end of the spectrum is Mexico whose

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[180] Securities Act § 13(1). *See generally* Krause, *supra* note 148; von Dryander, *The German Securities Trading Act: Insider Trading and Other Secondary Market Regulation*, 9 Insights No. 1, at 26 (1995).

[181] Consolidated Act on Financial Intermediation, art. 180, para. 3. *See* STEINBERG, *supra* note 1, at 132.

[182] Securities Act R.S.C. ch.S-5, § 76(5) (1990) (Can.).

[183] Securities Market Law art. 16-Bis.-1; *see* Zaldivar, *supra* note 144, at 66.

[184] *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc); *supra* note 25 and accompanying text.

[185] *See* Corporations Law § 1002G.

[186] *Id.*; *see* STEINBERG, *supra* note 1, at 142.

[187] *Id.*; *see* Roman Tomasic & Stephen Bottomley, *Corporations Law, in* AUSTRALIA 698-99 (The Federation Press, 1995); *see generally* PAUL REDMOND, COMPANIES AND SECURITIES LAW (2d ed. 1992).

[188] Criminal Justice Act §§ 52, 57. *See* Tim Herrington & Jason Glover, *The United Kingdom, in* INSIDER TRADING IN WESTERN EUROPE: CURRENT STATUS 33, 43

securities law regime declines to impose liability on tippers as well as tippees.[189]

A number of other countries have approaches that are more straightforward than the U.S. standard but at times not as encompassing. Under German law, for instance, primary insiders neither may trade nor tip. Recipients of material nonpublic information communicated by a primary insider, while subject to the trading proscription, are not themselves precluded from tipping the subject information to others.[190] France,[191] Italy,[192] and Japan[193] have similar provisions.

2.2. *Issuer Selective Disclosure Practices*

Under the U.S. insider trading regime, illegal tipping under Section 10(b) occurs when an insider tips for personal benefit. The difficulty of establishing such personal benefit along with the

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(Gerhard Wegen & Heinz-Dieter Assmann eds., 1994); Stamp & Welsh, *supra* note 147, at 109.

[189] *See* Securities Market Law art. 16-Bis 1. *See* STEINBERG, *supra* note 1, at 121 (stating that "[o]ne major criticism of the Mexican securities law regime is that it fails to provide liability for those who disclose privileged information to tippers and for tippees who trade on the basis of privileged information.").

[190] Securities Act § 14(1)-(2). *See* STEINBERG, *supra* note 1, at 128-29:

> Primary insiders are prohibited from trading on inside information for their own account or for the account of others, conveying inside information to others without proper authorization, and making recommendations to a third party to trade based upon inside information (tipping). Secondary insiders are prohibited from trading for their own account or for the account of others. Unlike primary insiders, secondary insiders are neither prohibited from disclosing information to other people nor from tipping. However, the recipients of such information would then become secondary insiders (tippees) and thus would be prohibited from trading on the inside information for their own account or for the account of others. Nonetheless, tippees can continue to pass along inside information provided that they do not trade on it themselves or for the account of others. This result may be explained as a means of facilitating the free flow of information in order to more expeditiously transform non-public inside information into public information.

Id.; *see* sources cited *supra*, notes 143, 180.

[191] Commission des Opérations de Bourse Regulation 90-08 arts. 2-5; art. 10-1 of Ordinance No. 67-833. *See* Borde, *supra* note 173, at 66-69.

[192] Consolidated Act on Financial Intermediation No. 58, art. 180, paras. 1, 2, *discussed in* Steinberg, *supra* note 1, at 132-33.

[193] Securities and Exchange Law art. 166, paras. 1, 3; *see* Toshio Kobayashi et al., *Japan*, *in* INTERNATIONAL INSIDER DEALING 321, 334-35 (Mark Stamp & Carson Welsh eds., 1996).

practice of companies selectively disclosing material nonpublic information to financial analysts and other favored market participants prompted the SEC to promulgate Regulation FD.[194]

In established securities markets outside of the United States, there should exist no impetus for adopting a special proscription against selective disclosure. That is because selective disclosure of material nonpublic information normally constitutes illegal tipping, and, hence, already is proscribed by statute.[195] Stated differently, conveyance of material nonpublic information by insiders to select persons, such as financial analysts (where no justifiable business reason exists for such disclosure and where the recipient is not subject to a confidentiality understanding), constitutes unlawful tipping under the statutory law of developed securities markets in the world.[196]

2.3. *Issuer Affirmative and Timely Disclosure Practices*

As discussed above, unless subject to specified affirmative disclosure obligations, U.S. securities law does not require companies to disclose material information in the interval between the filing of SEC periodic reports.[197] The timing of disclosure during this period generally is left to management's discretion.[198] Is this approach generally adhered to in other developed markets? The answer evidently is no. Under the laws of other jurisdictions, absent sufficient business justification, publicly-held issuers on a continuous basis must promptly and timely disclose material matters to the securities marketplace.[199] For example, pursuant to the United Kingdom's framework, any information that will cause a substantial movement in the price of a subject company's securities must be immediately released.[200] In Canada, if any material

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194 *See supra* notes 84-115 and accompanying text.

195 *See supra* notes 187-93 and accompanying text.

196 *See, e.g.*, the German Securities Act § 14(1)-(2), *supra* note 190 and accompanying text.

197 *See supra* notes 118-37 and accompanying text.

198 *See supra* notes 129-31 and accompanying text.

199 *See infra* notes 200-08 and accompanying text.

200 *See* Laurence James, *Securities Law in the United Kingdom*, *in* INTERNATIONAL SECURITIES LAW HANDBOOK 209, 215 (Karl-Eduard von der Heydt & Stanley Keller eds., 1995). Subject companies generally are those entities whose securities are traded on the primary market of the London Stock Exchange, known as the "Offi-

change[201] occurs in the interval between required statements, a subject issuer must make timely disclosure in regard thereto by means of press release.[202] Listed companies in Germany similarly are subject to continuous reporting obligations, thereby mandating prompt disclosure of material information.[203] Likewise, Australia mandates that listed issuers notify the stock exchange of material matters as they occur.[204]

This approach requiring prompt public disclosure of material information on a continuous basis is the preferred route. Jurisdictions outside of the United States with developed securities markets have rejected the U.S. position in favor of a continuous disclosure regime.[205] The International Organization of Securities Commissions ("IOSCO")[206] also advocates for continuous disclosure by issuers of material information. In its Objectives and Prin-

cial List." *Id.* at 209. Similar to the United States, the United Kingdom's approach is based on full disclosure of material information to investors and the securities markets. *See* STEPHEN W. MAYSON ET AL., MAYSON, FRENCH & RYAN ON COMPANY LAW 185 (13th ed. 1996).

201 Securities Act R.S.C. ch.S-5, § 1(1)21 (1990) (Can.) (defining "material change" as a "change in the business, operations or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of the security of the issuer."). *See* 10C INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION at 4-59 (H. Bloomenthal & S. Wolff eds., 1996). This obligation has been expanded by Canadian securities regulators to include disclosure of "material information." *See* GLOBAL OFFERINGS OF SECURITIES: ACCESS TO WORLD EQUITY CAPITAL MARKETS 110 (M. Brown & A. Paley eds., 1994).

202 *See* Securities Act R.S.C. ch.S-5, § 75(1) (1990) (Can.).

203 *See* Gesetz über den Wertpapierhandel (Wertpaierhandelsgesatz, v. 26.7 1994 (§ 15) (FRG); Krause, *supra* note 148, at 582-85. Note that Members of the EC are bound by the Council Directives. Each Member may elect to decide the method of implementation. The EC Admissions Directive mandates continuing reporting obligations. *See* Council Directive No. 79/279, 1979 O.J. (L 66) Schedule C §§ 2(a), 2(b), 4(a), 5(a), 6(a), at 30-1 (requiring, inter alia, that "the issuer inform the public as soon as possible of material current developments"); Marc I. Steinberg & Lee E.Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 256 (1999).

204 *See* 10E INTERNATIONAL SECURITIES MARKETS, *supra* note 201, at Gen. 3-28. Other countries, including France and Italy, have adopted similar standards. *See* Steinberg & Michaels, *supra* note 203, at 220, 226 (and authorities cited therein).

205 *See supra* notes 200-04 and accompanying text.

206 *See* generally A. A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. INT'L L. & BUS. 15 (1996) (discussing the formation and purposes of IOSCO); Steinberg & Michaels, *supra* note 203, at 238-46.

ciples of Securities Regulation,[207] IOSCO takes the following position: "Investors should be provided with the information necessary to make informed decisions on an *ongoing basis*. The principle of full, *timely* and accurate disclosure of *current* and reliable information material to investment decisions is directly related to the objectives of investor protection and fair, efficient and transparent markets."[208]

By deferring to management's judgment to determine the timing of disclosure during the interval between the filing of periodic reports, the U.S. securities laws lag behind those of other developed countries as well as IOSCO's position.[209] Although issuer delay in making disclosure of material information without business justification may violate self-regulatory organization ("SRO") rules, SROs rarely enforce these rules against subject issuers.[210] Given the competition among the exchanges and the NASDAQ for enticing and then retaining companies to list their securities with the respective SRO, this lack of SRO enforcement should be expected.[211]

3. COMMENTS FAVORING U.S. REGULATION

The foregoing discussion illustrates that the U.S. approach with respect to insider trading and timely disclosure lags behind other established markets in terms of promoting investor protection and market integrity. Nonetheless, in practical reality, the U.S. regime is viewed as preeminent irrespective of its shortcomings. The succinct explanation is the implementation of an effective enforcement and remedial U.S. framework that receives widespread support by market participants as well as the general populace.[212]

As seen by the experiences of many countries, statutes that impose strict standards (such as with respect to insider trading and issuer timely disclosure) are meaningful only to the extent that

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[207] International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (1998), IOSCO Document Library, *available at* http://www.IOSCO.org/docs-public/1998-objectives.html.

[208] *Id.* at pt. 111, 10.3 (emphasis added), *available at* http://www.IOSCO.org/docs-public/1998-objectives.html/.

[209] *See supra* notes 200-08 and accompanying text.

[210] *See supra* notes 117-18 and accompanying text.

[211] *See* Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 BUS. LAW. 1461 (1992).

[212] *See* STEINBERG, *supra* note 1, at 259.

they are enforced with some regularity. The lack or inadequacy of effective government personnel, resources, and surveillance poses little deterrent to prospective violators. Consequently, competent staff must be retained by the applicable regulator and be provided with the appropriate resources to conduct meaningful surveillance and prosecution.[213] This commitment has not been forthcoming with great vigor by several countries that have more rigorous standards than the United States.[214]

Along with this much relaxed enforcement of statutorily strict standards in the applicable country often is found cultural attitudes acquiescing in insider trading and issuer selective disclosure practices.[215] Such practices are perceived by affected participants as embedded in that securities market and as a way that business relations have been conducted for decades (if not centuries).[216] This attitude may deter regulators from initiating actions against purportedly distinguished business executives who are often viewed with admiration and respect. Principal reliance on a criminal mode of enforcement (due to that many countries do not adequately provide for civil enforcement by either the government or allegedly aggrieved private parties)[217] may accentuate this reluctance.[218] Respected executives thus are faced with penal sanctions in a culture that has not embraced the evils of such "gentlemen"

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[213] *Id.* at 261.

[214] *See, e.g.*, Roman Tomasic, *Insider Trading Law Reform in Australia*, 9 COMPANY & SEC. L.J. 121 (1991).

[215] For example, although having a relatively detailed insider trading proscription, South Africa has initiated few, if any, criminal prosecutions. *See* Franco H. van Zyl, *South Africa: Insider Trading Regulation and Enforcement*, 15 COMPANY LAW. INT'L 92 (1994). Although viewed as doing more to combat insider trading than most jurisdictions, "prosecution of insider trading [in Canada] remains minimal." Nasser, *The Morality of Insider Trading in the United States and Abroad*, 52 OKLA. L. REV. 377, 385 (1999). With respect to Japan, that country is perceived as an "'insider's heaven' where people rampantly profit from inside information with little detection or prosecution." *Id.* at 382, *quoting*, Tomoko Akashi, *Regulation of Insider Trading in Japan*, 89 COLUM. L. REV. 1296, 1302 n.45 (1989).

[216] *See* Andre Tunc, *A French Lawyer Looks at American Corporation Laws and Securities Regulation*, 130 U. PA. L. REV. 757, 762 (1982) (stating that in France tipping of material nonpublic information is perceived as "a social duty . . . expected of relatives and friends."); sources cited *supra* note 215.

[217] *See, e.g.*, Nasser, *supra* note 215, at 380-84; Note, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, 73 WASH. U. L. Q. 1399 (1995); STEINBERG, *supra* note 1, at 148 (Japan).

[218] *See* STEINBERG, *supra* note 1, at 264.

offenses.[219] Courts also play a key role in this process, often refusing to convict a defendant on the basis of circumstantial evidence[220] and imposing relatively lenient sanctions when guilt has been established.[221] Although recent developments in certain countries suggest that more successful surveillance and enforcement practices are being deployed,[222] a long road must be traversed to approach the effectiveness of U.S. civil and criminal enforcement.[223]

Hence, irrespective of the apparent laxity and confusion in the U.S. law of insider trading and issuer prompt disclosure, the U.S. regime remains preeminent. The SEC's important role as regulator, with its capable personnel, resources, and surveillance, is perhaps the most significant ingredient comprising effective enforcement of the U.S. securities laws.[224] In addition, enhanced criminal prosecution for insider trading has become an accepted component of the enforcement landscape.[225] As a further layer of enforcement, allegedly aggrieved traders may institute civil actions seeking damages against those who illegally trade on the basis of or tip material nonpublic information.[226]

The impropriety of insider trading and like offenses[227] is generally accepted by market participants, the public, and the judiciary. In other words, unlike many other countries, the cultural attitudes prevalent in the U.S. favor relatively rigorous enforcement and

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[219] *Id.*

[220] *See* Marie McDonald & Blake Dawson Waldron, *Australia*, *in* INTERNATIONAL INSIDER DEALING 439, 442 (Mark Stamp & Carson Welsh eds., 1996); Roman Tomasic & Brendan Pentony, *The Prosecution of Insider Trading: Obstacles to Enforcement*, 22 AUST'L. & N.Z. J. CRIMINOLOGY 65, 65-66 (1989).

[221] In Germany, the first conviction for insider trading was not procured until 1995. Moreover, no prison sentence was ordered. *See German Insider-Trading Probe*, WALL ST. J., Aug. 22, 1995, at A6. *See also Ex-Lawyer Gets Suspended Term for Insider Trading*, JAPAN ECON. NEWSWIRE, July 28, 1997.

[222] *See* STEINBERG, *supra* note 1, at 121-40, 214-37.

[223] *See* Nasser, *supra* note 215, at 377 (stating that in addition to Canada and Japan, "insider trading seems to go largely unpunished in Australia, France, Germany, and Mexico").

[224] *See* DAVID A. VISE & STEVE COLL, EAGLE ON THE STREET (1991).

[225] *See, e.g.*, 15 U.S.C. § 78ff(a) (1994); United States v. O'Hagan, 117 S. Ct. 2199 (1997).

[226] *See, e.g.*, 15 U.S.C. § 78ff(E) (1994); Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980).

[227] Such offenses include stock manipulation, parking of securities, and "scalping." *See generally* NORMAN POSER, BROKER-DEALER LAW AND REGULATION (1995).

prosecution of these offenses.[228] Judges contribute to this atmosphere by upholding insider trading convictions based on circumstantial evidence[229] and by, pursuant to the federal sentencing guidelines,[230] imposing lengthy periods of incarceration where circumstances warrant.[231] Thus, as compared to other jurisdictions, U.S. enforcement in this area is effective, thereby inducing law compliance[232] and facilitating market integrity.[233]

4. CONCLUDING OBSERVATIONS

U.S. regulation of insider trading as well as issuer timely disclosure practices is far from ideal. Without adequate justification, ambiguity, complexity and uneven treatment of similarly situated market participants too often prevail. Perhaps recognizing these shortcomings, countries with developed securities markets largely have declined to adhere to U.S. standards on these subjects. The approaches adopted by many countries abroad thus represent an effort to provide clear statutory direction with respect to the insider trading proscription as well as issuer timely disclosure. Focusing on the statutes by themselves, these countries may have achieved their objectives.[234]

Nonetheless, due to such deficiencies as inadequate funding, personnel, resources, and surveillance, ineffective enforcement

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[228] *See* Nasser, *supra* note 215, at 388-93. *See generally* W. Wang & M. Steinberg, *supra* note 10.

[229] *See, e.g.*, SEC v. Sargent, 229 F.3d 68, 75 (1st Cir. 2000) ("'Circumstantial evidence, if it meets all the other criteria of admissibility, is just as appropriate as direct evidence....'"), *quoting* United States v. Gamache, 156 F.3d 1, 8 (1st Cir. 1998). *Accord* SEC v. Euro Security Fund, 2000 WL 1376246 (S.D.N.Y. 2000).

[230] 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994); 28 U.S.C. §§ 991-998. *See generally* Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231 (1997) (summarizing the papers presented at a symposium on federal sentencing guidelines).

[231] *See, e.g.*, United States v. O'Hagan, 139 F.3d 641, 653-56 (8th Cir. 1998); United States v. Cusimano, 123 F.3d 83, 90-91 (2d Cir. 1997).

[232] *See* WANG & STEINBERG, *supra* note 10, at 807-909.

[233] *Id.* at 547-672; Nasser, *supra* note 215, at 388-94; John J. Phelan, Jr., *Integrity Is a Necessity on Wall Street*, N.Y.L.J., Mar. 16, 1987, at 29. *But see* Jeffrey M. Laderman *The Epidemic of Insider Trading*, BUS. WK., Apr. 29, 1985, 78, 80-81. *See generally* JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS AND POLICY (1991); Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375 (1999) (discussing the importance and possible methods of rectifying insider trading).

[234] *See supra* notes 141-208 and accompanying text.

generally has been predominant in markets abroad. Laws normally are as potent as their effective implementation. The deterrent impact of rigorous statutes recedes drastically as the likelihood of successful usage lessens. Hence, statutes that are intended to enhance market integrity and investor protection have relatively negligible effect if there exists widespread noncompliance. The lack of successful enforcement thereby facilitates disobedience by market participants with applicable statutory mandates.[235]

This scenario explains why the U.S. markets are perhaps the most admired in the world. As discussed above, the legal prescriptions, at least those relating to insider trading and issuer timely disclosure, are not without their shortcomings. Although far from ideal, the standards adopted are perceived as within the range of acceptability and have become embedded in the ethos of the U.S. capital markets. Even more significant, these standards are effectively enforced by the U.S. SEC, the U.S. Department of Justice in criminal proceedings, and private litigants who seek damages from alleged violators. Hence, reasonably effective enforcement of statutory, judicial, and regulatory pronouncements that define specified conduct as being unlawful enhances compliance with the rule of law as well as investor confidence in market integrity.

Many countries, including those that are members of the European Community, are devoting significantly greater resources toward successful implementation of their statutory mandates relating to abusive practices such as insider trading. Sufficient allocation of resources, of course, encompasses procuring adequate funding, personnel, and technological surveillance mechanisms. Agendas also should include educational or "enlightenment" missions to stress the importance of these statutory prohibitions to affected constituencies, such as corporate insiders, bankers, legislators, judges, and the investing public. Once reasonably successful enforcement of legal mandates ensues and is perceived in that fashion by market participants, the affected country's securities markets will be deemed more attractive as a forum for both capital raising and investment purposes.

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[235] *See* Bernard Black, *The Core Institutions That Support Strong Securities Markets*, 55 BUS. LAW. 1565, 1576-578 (2000); Marc I. Steinberg, *Emerging Capital Markets: Proposals and Recommendations for Implementation*, 30 INT'L LAW. 715, 723-25 (1996).